83-1037

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HOWARD CROSS, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether alleged discrimination in the selection of grand jury forepersons resulting in the underrepresentation of women and blacks in that position provides a basis for reversal of a conviction upon an indictment returned by the grand jury.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-18a) is reported at 708 F.2d 631. The pertinent opinion of the district court (App. B, *infra*, 19a-34a) is reported at 516 F. Supp. 700.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 35a) was entered on June 30, 1983. An order denying the government's timely petition for rehearing (App. D, *infra*, 36a-37a) was entered on September 26, 1983. On November 16, 1983, Justice Powell extended the time in which to file a petition for a writ of certiorari until December 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of his pretrial motion challenging selection procedures for grand jurors, petit jurors, and grand jury forepersons, and his motion seeking recusal of the sitting judges of the district court, and an ensuing jury trial in the United States District Court for the Middle District of Georgia, respondent was convicted on all four counts of an indictment charging drug-related offenses. The offenses that respondent was determined to have committed were: conspiracy to import methaqualone (quaaludes), a controlled substance, conspiracy to possess methaqualone with intent to distribute, and the respective completed substantive offenses, in violation of 21 U.S.C. 841(a)(1), 846, 952 and 963. Respondent was sentenced to five years' imprisonment on each count, the sentences to run consecutively. In addition, the court imposed a 10-year special parole term.

1. The evidence developed at trial, the sufficiency of which respondent did not contest in the court of appeals, established that respondent, along with four coconspirators, introduced into the United States 28 cartons, containing 843,000 methaqualone tablets, that had been obtained in Colombia, South America.[1] Together with the other defendants, respondent acquired an airplane to carry out this mission, and modified the plane by installing needed special radio equipment and fuel tanks.[2] Two of the conspirators departed from the

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[1] Along with respondent, the indictment charged Vernon Seifkes, William H. Cross, Jr. (respondent's son), James C. Clark, and Carl London in each of the four counts. Seifkes and the younger Cross waived the right to a jury trial and were found guilty based upon stipulated facts (3 Tr. 186-205). Clark entered a guilty plea (see 4 Tr. 11). London is a fugitive (App., *infra*, 2a n.1).

[2] 4 Tr. 53-56, 131-136; 6 Tr. 38-41, 56-61, 121-124.

Cuthbert, Georgia, airport in the airplane on October 16, 1980.[3] Unbeknown to respondent and the other defendants, the plane was under surveillance by federal and state law enforcement officers. The plane was tracked by United States Customs Service agents the next day when it reentered United States airspace.[4] The plane was pursued by Customs Service aircraft, back to Cuthbert, Georgia, where it landed. The controlled substances that form the basis for this prosecution, along with maps and other items indicating that the plane had been flown to Colombia, were found in a search of the plane.[5]

2. In November 1980, a federal grand jury sitting in the Middle District of Georgia indicted respondent and three of his co-conspirators upon charges arising from the foregoing events. A superseding indictment, upon which respondent ultimately was convicted, was returned against all of the defendants on January 11, 1981. Prior to trial, respondent moved to dismiss the indictment on two procedural grounds. Respondent claimed, first, that the juror selection procedures employed in the Middle District of Georgia did not assure random selection of grand jurors and petit jurors from a fair cross section of the community. Respondent alleged that the procedures employed violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* App., *infra*, 2a.

In addition, respondent, a white male, asserted that blacks and women had been discriminated against in the selection of grand jury forepersons in the Middle District of Georgia (R. 263, 371). In support of the latter contention, respondent presented the affidavit of Roger Friedman, a statistician who had examined the

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[3] 4 Tr. 150-154.

[4] 5 Tr. 37, 49-51.

[5] 5 Tr. 94, 123; 7 Tr. 10-18.

records of the district court pertaining to grand juries empaneled subsequent to July 31, 1973. According to the Friedman affidavit, 15 grand juries had been impanelled in the eight-year period in question. In each instance the foreperson was a white male. Deputy forepersons during this period were white males in nine instances, white females in two cases, black males in three cases, and a black female in one instance. R. 364-366. Respondent claimed that underrepresentation of blacks and women in the position of foreperson reflected a "constitutional violation of [his] Fifth Amendment due process rights" (R. 263).[6] In addition, respondent filed a motion seeking recusal of each of the senior and active judges of the district court who had selected one or more grand jury forepersons during the period 1973-1981, on the ground that those judges "will, by necessity, be witnesses at any hearing on this matter" (R. 337).

At a hearing on pretrial motions on June 5, 1981, the district court, Elliott, J., explored the nature of respondent's claim of discriminatory foreperson selection and the basis for the related recusal motion. Respondent's counsel asserted that the statistics contained in the Friedman affidavit established a prima facie case of in-

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[6] Other than the quoted statement, there appears to be little in the record to indicate the precise nature of respondent's claim, and especially whether he relied upon a due process as opposed to an equal protection theory. It appears from the record that no memorandum of law accompanied respondent's motion. A memorandum accompanying respondent's motion for reconsideration of the denial of his motion (see page 7, *infra*) does not make this distinction either. However, in his motion to reconsider, in asserting his standing to complain of discrimination against blacks and women in foreperson selection, respondent relied upon a Fifth Amendment due process case (*Peters* v. *Kiff*, 407 U.S. 493 (1972)) and a Sixth Amendment fair cross section case (*Duren* v. *Missouri*, 439 U.S. 357 (1979)) (see R. 412).

tentional discrimination in foreperson selection (3 Tr. 11, 15-16), sufficient to shift to the government the burden of proving, through the testimony of the judges who appointed forepersons during the eight-year period surveyed, the absence of intentional discrimination (3 Tr. 11-12, 15-17). The district court suggested practical and logical difficulties with this argument in colloquy with respondent's counsel (3 Tr. 11-12):

> THE COURT: * * * Now, the Indictment is not returned by but one Grand Jury. * * * There cannot be but one Foreperson. There can't be but one. Alright, you have white men, you have white women, you have black men, you have black women. You can't have, if you can find me a person who is a composite of all of those qualities, I will be happy to appoint that person as a Foreman of the next Grand Jury that convenes in the Middle District of Georgia. But, now when we come in and the Foreperson is a white man, you are going to complain. He is not a woman and he is not black. Then, if we come in where you have a white woman, you are going to complain, well, she is not black or she is not a man. How can you possibly satisfy your complaint there?
>
> [RESPONDENT'S COUNSEL]: What we are saying, Your Honor, is something like fifty-two percent of the forepersons in this District should be women.
>
> [THE COURT]: What difference does it make to your client who the Foreperson was of a Grand Jury in 1972 that indicted somebody in the Columbus Division for operating a liquor still? Your client is interested only in this Indictment.

The district court also queried counsel as to respondent's standing to press a claim of discrimination against blacks and women (3 Tr. 11, 12). Respondent answered that his standing to complain of discrimination was established "because fifty-two percent of the

Forepersons in the past eight years have not been women" (3 Tr. 12).

At the June 5 hearing, the government did not contest the statistics cited in the Friedman affidavit, stating instead the government's position that underrepresentation of blacks and women among grand jury forepersons was in no event a basis for dismissing the indictment, and that there accordingly was no need to adduce the testimony of the district judges who had appointed forepersons in the district (3 Tr. 13, 17). Based upon that position, the government suggested that if respondent's affirmative case rested solely upon the statistics in the Friedman affidavit, no evidentiary hearing would be necessary (3 Tr. 13).

Turning to the recusal motion, the court inquired as to the questions that respondent proposed to put to the district judges as witnesses on the question of discriminatory foreperson selection (3 Tr. 14-17). Respondent explained that he proposed to ask each of the various judges whether he had "discriminated consciously" in the selection of forepersons (3 Tr. 15), and whether he had considered the race, sex, job, community position, affluence, and friends of prospective forepersons (3 Tr. 17).

3. The district court denied the motion to dismiss based upon alleged discrimination in foreperson selection (App., *infra*, 19a-34a). Pointing to the extremely limited administrative duties assigned to the foreperson by Fed. R. Crim. P. 6(c), the district court reasoned that forepersons do not have such extensive authority or influence over the deliberations of the grand jury as a whole that an indictment returned by a properly constituted grand jury should be vulnerable to constitutional attack because of failure to appoint blacks or women to that position (App., *infra*, 21a-23a). Forepersons of federal grand juries, the court emphasized, unlike those in some state systems, are chosen

from among the members of the grand jury and hold office only for the term of a single grand jury (*id.* at 25a-26a). In addition, the court noted, unlike the selection of grand jurors, which is regulated by the Jury Selection and Service Act, the selection of the grand jury foreperson is entrusted by law to the discretion of the district court (*id.* at 22a-23a). The district court thus held that neither respondent's Fifth Amendment equal protection claim, nor any Sixth Amendment fair cross section claim had merit in these circumstances (*id.* at 27a-28a).[7]

As an alternative basis for denying respondent's motion, the district court held that, as a white male, respondent lacked standing to advance an equal protection claim (App., *infra*, 26a-27a, 28a). In addition, the court denied respondent's motion for recusal of all sitting judges in the district, reasoning that a litigant is not entitled to probe the subjective mental processes of a judicial officer in connection with a decision entrusted to judical discretion, such as the appointment of the grand jury foreperson (*id.* at 29a-34a). Both for that reason, and because of the court's ruling on the foreperson discrimination issue, the court observed, there was no likelihood of judicial testimony in this case such as might occasion recusal (*id.* at 34a).

A motion for reconsideration of the district court's rulings on the foreperson issue was denied (see 3 Tr. 20).[8] After conducting an evidentiary hearing (see 3 Tr.

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[7] The district court noted that respondent did not rely upon the Sixth Amendment in alleging discrimination in foreperson selection (App., *infra*, 28a).

[8] In the memorandum supporting this motion, respondent claimed, apparently for the first time, that it was necessary to hold an evidentiary hearing to determine whether, in fact, grand jury forepersons in the Middle District of Georgia exercise significant authority or influence over the actions of the grand jury. Compare page 6, *supra*.

19-98, 134-175), the district court also rejected respondent's separate challenges to the selection procedures used to constitute grand and petit juries in the Middle District of Georgia (R. 483-486). The case then proceeded to trial, and respondent was convicted upon the jury verdict and sentenced (see page 2, *supra*).

4. Respondent appealed from the judgment of conviction, challenging only the district court's rejection of his foreperson discrimination claim and denial of his recusal motion (see App., *infra*, 2a n. 3). The court of appeals reversed the denial of respondent's motions to dismiss the indictment based on foreperson discrimination and for recusal, remanding both matters for further proceedings.

Without distinguishing between the due process and equal protection theories that might have been advanced in support of a Fifth Amendment challenge to alleged discrimination in foreperson selection, the court of appeals held that respondent had standing to pursue his claim (App., *infra*, 3a-6a).[9] Although aware of the contrary decision of the Fourth Circuit in *United States* v. *Hobby*, 702 F.2d 466 (1983), cert. granted, No. 82-2140 (Dec. 12, 1983), the court reaffirmed its prior decisions in *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982), and *United States* v. *Holman*, 680 F.2d 1340 (1982), holding that discrimination in foreperson selection forms a legally sufficient basis for reversal of a conviction and dismissal of the underlying indictment (App., *infra*, 6a-15a).[10] In support of its

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[9] The court relied upon *Peters* v. *Kiff*, *supra*, a due process case, as authority for its decision (App., *infra*, 5a-6a). In the court of appeals, as in the district court (see page 4 note 6, *supra*), respondent had failed to make clear the precise nature of his claim.

[10] In both *Perez-Hernandez* and *Holman*, the court of appeals had concluded that the government had demonstrated the absence of discrimination. There accordingly was no opportuni-

decision, the court of appeals stated its view that the duties of federal grand jury forepersons are not wholly ministerial. These duties, the court noted, may include serving as a conduit for communications with the United States Attorney or the supervising district judge, some influence over the grand jury's schedule, and consultation with the prosecutor concerning issuance of subpoenas. *Id.* at 10a-11a. The court of appeals also suggested that the testimony of district judges in other cases, indicating that they sought forepersons with leadership ability and management skills, reflected the significance of the role of foreperson (*id.* at 11a-12a), and that the mere designation of a particular individual as foreperson may endow that person with enhanced status in the eyes of other grand jurors, affording the foreperson disproportionate influence in grand jury deliberations (*id.* at 12a). The court thought it unacceptable to distinguish between the constitutional significance of federal and state grand jury forepersons (*id.* at 13a-14a), or between claims challenging the composition of the grand jury as a whole and those directed only at the selection of the foreperson (*id.* at 15a), asserting that any other rule would "undermin[e] the grand jury's constitutional significance" and impair its ability "to effectively fulfill its role as a check on prosecutorial abuse" (*ibid.*).

The court of appeals accordingly remanded for a determination whether foreperson selection in the Middle District of Georgia reflected discrimination against blacks or women. The court also strongly suggested that the testimony of the judges of the district court who had appointed forepersons as to their selection criteria and procedures and any discriminatory intentions, was properly to be received upon remand, and, indeed,

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ty for the government to seek further review of the rulings that foreperson discrimination was a sufficient basis for dismissal of an indictment.

that it was the only relevant (non-statistical) evidence (App., *infra*, 16a-17a). Rather than rule upon the recusal issue itself, however, the court of appeals remanded the recusal issue to the district court for reconsideration (*id.* at 17a).

REASONS FOR GRANTING THE PETITION

In *Rose* v. *Mitchell*, 443 U.S. 545, 551-552 n.4 (1979), this Court declined to express any view on whether "discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire." The court of appeals' affirmative answer to the question thus reserved, as it applies to federal grand juries, is contrary to decisions of the Third, Fourth and Ninth Circuits. See *United States* v. *Aimone*, 715 F.2d 822, 826-827 (3d Cir. 1983), petitions for cert. pending *sub nom. United States* v. *Dentico*, No. 83-681 and *United States* v. *Musto*, No. 83-690; *United States* v. *Hobby*, *supra*; *United States* v. *Coletta*, 682 F.2d 820, 824 (9th Cir. 1982), cert. denied, No. 82-798 (Feb. 22, 1983). The court of appeals in the present case recognized that its decision was contrary to *Hobby* (App., *infra*, 10a). Because of the Eleventh Circuit's adherence, in this case, to its position contrary to that of the Third, Fourth and Ninth Circuits, we did not oppose the petition filed by the defendant in *Hobby*, to the extent it presented the foreperson discrimination issue. For the reasons stated in our brief in *Hobby* at pages 11-17, we submit that the decision below is erroneous and that the question presented warrants this Court's review.[11] Now that the Court has undertaken to decide this question and to re-

[11] A copy of our brief at the petition stage in *Hobby* has been provided to respondent.

solve the conflict by granting certiorari in *Hobby*, it would be appropriate to hold this petition pending disposition of *Hobby*.[12]

CONCLUSION

The Court should dispose of this petition in light of its decision in *Hobby* v. *United States*, No. 82-2140.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1983

[12] Although the court of appeals' opinion in this case addresses a preliminary issue of standing that was not addressed by the Fourth Circuit in *Hobby*, we believe that there is no need to grant plenary review here. Our challenge to respondent's standing extends only to any equal protection theory advanced by a white male defendant. See Brief for the United States at 11 n. 4, *Hobby* v. *United States*, No. 82-2140. Thus the standing argument is merely a subsidiary aspect of our argument on the merits of the Fifth Amendment claim advanced here, which serves to clarify the basis for the respondent's challenge to the indictment. Because the present respondent, like the petitioner in *Hobby*, has never made clear the precise nature of his claim, and may rely, at least in part, on a pure due process theory, we believe it appropriate simply to hold this case.

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

JUNE 30, 1983

No. 81-7783.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

WILLIAM HOWARD CROSS, SR.,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Middle District of Georgia.

Before JOHNSON and ANDERSON, Circuit Judges, and COLEMAN*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This appeal presents this Court with an opportunity to examine the issues involved in the evaluation of claims of race and sex discrimination in the selection of federal grand jury forepersons by United States District Judges. The government invites us to accept the district court's conclusion in this case that the office of federal grand jury foreperson is constitutionally insignificant and therefore that allegations of discrimination in the selection of forepersons cannot form the basis for a motion to dismiss a criminal indictment. But in light of prior precedent and our belief that discrimination in the selection of federal grand jury forepersons "strikes at the fundamental values of our judicial system and our society as a whole," *Rose v. Mitchell*, 443 U.S. 545, 556, 99 S.Ct. 2993, 3000, 61 L.Ed.2d 739 (1979), we decline the government's invitation and reverse the judgment of the district court.

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*Honorable James P. Coleman, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

I.

In November, 1980, a federal grand jury empanelled in the Middle District of Georgia indicted William Howard Cross, Sr., along with four codefendants, for conspiracy to import methaqualone (quaaludes), conspiracy to possess methaqualone with intent to distribute, importation, and possession. Before this trial, Cross moved to dismiss his indictment.[1] He alleged two grounds in support of this motion: first, that the procedures by which grand jurors and petit jurors had been selected in the Middle District of Georgia since 1973 did not ensure random selection from a fair cross section of the community as required by the Sixth Amendment and the Jury Selection and Service Act of 1968, as amended, 28 U.S.C.A. § 1861 *et seq.*; and second, that blacks and women had been discriminated against in the selections of grand jury forepersons, in violation of the Fifth Amendment.[2] Cross subsequently filed a motion for recusal of the three district judges of the Middle District of Georgia who had participated in the selection of grand jury forepersons since 1973.

The district court entered an opinion and order on these motions 1) reserving ruling on the challenges to the composition of the grand and petit juries,[3] 2) denying the challenge to the selection of grand jury forepersons, and 3) denying the recusal motion. *United States v. Cross*, 516 F.Supp. 700 (M.D.Ga.1981). Con-

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[1] Two of Cross's codefendants waived a jury trial and were convicted, the third pled guilty, and the fourth was a fugitive as of the time of the filing of this appeal.

[2] According to Cross, no blacks or women have served as foreperson on any of the fifteen grand juries empanelled in the Middle District of Georgia between July 31, 1973, and May 29, 1981.

[3] The district court, after evidentiary hearings on the grand and petit jury challenges, ruled against them; Cross does not raise these challenges in this appeal.

cerning the challenge to the foreperson selections, the court stated that

> it is the opinion of this court that no constitutional significance attaches to the position of foreman or deputy foreman of a federal grand jury. A criminal defendant has no constitutional right to a grand jury foreman or deputy foreman of a particular race or sex any more than he has a constitutional right to a grand jury panel of a particular composition or a constitutional right to a Supreme Court Justice, a United States Circuit Judge, or United States District Judge of a particular race or sex. Accordingly, the court holds that the appointment by a district judges under Rule 6(c), Federal Rules of Criminal Procedure, of a foreman or deputy foreman in a federal grand jury drawn from a source constitutionally and statutorily composed, and thus representing a fair cross-section of the community, is not subject to constitutional attack on grounds of discrimination.

Id. at 705 (citing *Hale v. Henderson*, 485 F.2d 266, 269-70 (6th Cir.1973), *cert. denied*, 415 U.S. 930, 94 S.Ct. 1442, 39 L.Ed.2d 489 (1974)). The district court also ruled that Cross lacked standing to challenge the selections of grand jury forepersons. *Id.* at 706. Cross subsequently was tried and convicted. In this appeal, he contends that the district court erred in denying him standing, in concluding that the office of federal grand jury foreperson is constitutionally insignificant, and in denying his recusal motion. We address each contention in turn.

II.

The district court denied Cross standing to raise his Fifth Amendment challenge to the selections of grand jury forepersons because Cross is a white male. In denying standing, the court quoted dictum in *Castenada v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977), suggesting that "in

order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of *his* race or of the identifiable group *to which he belongs.*" (emphasis added). To the extent that this language suggests that a defendant must be a member of the underrepresented race or group, it is at best dictum because Rodrigo Partida's challenge to the composition of grand juries was restricted to an allegation of discrimination against Mexican-Americans who, like him, had Spanish surnames. As we recognized in *United States v. Perez-Hernandez*, 672 F.2d 1380, 1386 (11th Cir.1982), the Court's reference in *Castenada* to "his" race or group may have been meant only to describe "the particular defendants involved in that case." At no other point in the *Castenada* opinion did the Court suggest that a person who is not a member of an underrepresented group cannot challenge the grand jury selection process. Thus, *Castenada* did not present or decide the issue of a defendant's standing to challenge grand jury or grand jury foreperson selections.

Similarly, *Rose v. Mitchell*, *supra*, which quoted the language at issue in *Castenada*, *see* 443 U.S. at 565, 99 S.Ct. at 3005, also does not stand for the proposition that only members of the underrepresented group may challenge grand jury foreperson selections. In *Rose*, two black defendants challenged the selection of Tennessee grand jury forepersons on grounds of underrepresentation of blacks, so the question of standing was not presented or discussed. In fact, the *Rose* Court's description of the class of persons adversely affected by discrimination in the selection of grand jury forepersons arguably suggests a broad view of standing:

> The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to a jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181 (1946).

443 U.S. at 556, 99 S.Ct at 3000.

The significance of the fact that neither *Castenada* nor *Rose* presented or decided the question of standing is that the holding of *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972)—a case which the district court did not cite—therefore remains good law. In *Peters*, a majority of the Court held that the defendant Peters, a white male, had standing to challenge the exclusion of blacks from jury service in Muscogee County, Georgia.[4] That *Peters* remains good law is confirmed by a favorable citation to *Peters* in *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct. 692, 695, 42 L.Ed.2d 690 (1975), a case in which the Court permitted the defendant Taylor, a male, to raise a Sixth Amendment challenge to his jury venire for underrepresentation of women. "[T]here is no rule," the court held, "that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service." *Id. Taylor* thus supports our

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[4] Justice Marshall, in an opinion joined by Justices Douglas and Stewart, analyzed the exclusion of blacks from grand jury service as a violation of due process. In a concurring opinion, Justice White, joined by Justices Brennan and Powell, framed the issue as a statutory violation. *See* 18 U.S.C.A. § 243. But as the Supreme Court later noted, "[s]ix members of the Court [in *Peters*] agreed that petitioner was entitled to present the issue and concluded that he had been deprived of his federal rights," even though the defendant was white. *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct. 692, 695, 42 L.Ed.2d 690 (1975).

statement in *Perez-Hernandez, supra*, 672 F.2d at 1386, that "[t]he holding in *Peters v. Kiff* is clear and unambiguous and has never been expressly overruled." On this ground, we permitted Perez-Hernandez, a male Hispanic, to challenge the exclusion of blacks and women from service as federal grand jury forepersons, and in *United States v. Holman*, 680 F.2d 1340, 1355-56 (11th Cir.1982), we permitted a white male to do the same.

In light of *Peters v. Kiff*, *Taylor v. Louisiana*, *United States v. Perez-Hernandez*, and *United States v. Holman*, we conclude that appellant Cross, a white male, has standing to challenge the selection of grand jury forepersons on grounds of underrepresentation of blacks and women.

III.

Having decided that Cross has standing to raise his claim of discrimination in the selection of grand jury forepersons, we turn to the merits of the issue of whether the office of federal grand jury foreperson is, as the district court concluded, constitutionally insignificant.

As recently as *Rose v. Mitchell*, *supra*, the Supreme Court reaffirmed the longstanding fundamental principle that discrimination in the administration of justice harms the accused and undermines the integrity of the judicial process itself. This recognition traces its roots back to *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879), in which the Supreme Court addressed a claim of exclusion of blacks from jury service. "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified," the *Strauder* Court stated, "is practically a brand upon them, affixed by the law, as assertion of their inferiority, and a stimulant to

that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.* at 308, 25 L.Ed. 664. One hundred years later, the Court in *Rose* was presented with a claim of exclusion of blacks from service as state grand jury forepersons in Tennessee. The Court quoted at length from *Strauder*, *see* 443 U.S. at 555, 99 S.Ct. at 2999, and then went on to suggest that:

> Discrimination on the basis of race, odious in all aspects, is expecially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 [61 S.Ct. 164, 165, 85 L.Ed. 84] (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181 (1946).

The government now takes the position that the principles articulated in *Strauder* and *Rose* do not apply to claims of discrimination in the selection of *federal* grand jury forepersons. The government asserts that, in the federal system, the grand jury foreperson performs only "ministerial" tasks and that the position has little

or no significance. This is, the government continues, in contrast with the position of grand jury foreperson in some states (such as Tennessee) where significant responsibilities are set out by statute. In the federal system, the only description of the grand jury foreperson's responsibilities is contained in Fed.R.Crim.P. 6(c), which provides:

> Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

In support of its argument that the office of foreperson is insignificant, the government further points out that the absence of the foreperson's signature is not fatal to an indictment. *See* Fed.R.Crim.P. 6(c) advisory committee; *Frisbie v. United States*, 157 U.S. 160, 163-65, 15 S.Ct. 586, 587-86, 39 L.Ed. 657 (1895).

The Supreme Court has never addressed the question of whether the position of federal grand jury foreperson is constitutionally significant. The government contends that the Court has never even decided the constitutional significance of the office of grand jury foreperson in any of the 50 states. The Court in *Rose* did assume, without deciding, that a defendant may allege discrimination in the selection of Tennessee grand jury forepersons as a basis for a motion to dismiss his indictment. *See* 443 U.S. at 551 n.4, 99 S.Ct. at 2998 n.4; *see also Williams v. State of Mississippi*, 608 F.2d 1021, 1022 (5th Cir.1979) (assuming, without deciding, that right to grand jury selected without regard to race

applies to selection of Mississippi grand jury foreperson), *appeal dimissed*, 449 U.S. 804, 101 S.Ct. 49, 66 L.Ed.2d 8 (1980). The *Rose* Court did not have to decide the issue because the Court found that the petitioner's evidence was insufficient to make out a prima facie case of discrimination. *See* 443 U.S. at 564-74, 99 S.Ct. at 3004-09. Nevertheless, the thrust and spirit of the language in *Rose*, which detailed the costs to defendants and to society of discrimination in the administration of justice, suggests to us that the Supreme Court still believes in the importance of providing a viable remedy for such discrimination.

Since *Rose*, the former Fifth Circuit and the Eleventh Circuit have directly addressed claims of discrimination in grand jury foreperson selections in both the state system and the federal system.[5] In *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir.1981) (en banc), two black persons convicted of grand theft in Louisiana state court brought a federal habeas corpus petition alleging that they were entitled to a new trial because blacks had been systematically excluded from service as Louisiana grand jury forepersons. The en banc court, after noting that the Supreme Court in *Rose* had assumed, without deciding, that the position of grand jury foreperson in Tennessee is constitutionally significant, concluded that

> [i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination affected only the foreman. Accepting the assumption made in *Rose v. Mitchell*, we hold, therefore, that the district court properly considered the claim of discrimination in the selection of [Louisiana] grand jury fore-

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[5] The Eleventh Circuit has adopted as binding precedent the case law of the former Fifth Circuit handed down as of September 30, 1981, unless and until such precedent is overruled or modified by this Court en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

men made in the habeas corpus petition filed by Guice and Claxton.

661 F.2d at 499. Soon thereafter, this holding was applied to federal grand jury foreperson selections in *United States v. Perez-Hernandez*, 672 F.2d 1380, 1386 (11th Cir.1982). *Accord*, *United States v. Holman*, 510 F.Supp. 1175 (N.D.Fla.1981) (Hatchett, Circuit Judge, sitting by designation) (claim of discrimination in selection of federal grand jury forepersons), *aff'd in relevant part*, 680 F.2d 1340 (11th Cir.1982); *United States v. Jenison*, 485 F.Supp. 655, 660-61 (S.D.Fla.1979) (Hatchett, Circuit Judge, sitting by designation) (same). *See also United States v. Abell*, 552 F.Supp. 316, 320-21 (D.Me.1982); *but see United States v. Hobby*, 702 F.2d 466, 470-71 (4th Cir.1983). Both *Perez-Hernandez* and *Holman* are directly on point, and as prior panel decisions of this Circuit, they are binding on us.

[3] Even if we were not bound by Eleventh Circuit precedent, we would not adopt the government's contention that the position of federal grand jury foreperson is too insignificant to form a basis for challenging an indictment. Three reasons support this conclusion.

First, the responsibilities and duties of the foreperson in the federal system cannot, in our view, be dismissed as merely ministerial.[6] For example, the foreperson decides when to contact the district judge, and the foreperson consults with the judge outside the presence of the grand jury.[7] Communications between

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[6] The district court, in reaching a contrary conclusion on this issue, held no evidentiary hearings to determine the foreperson's responsibilities. In light of prior precedent and the analysis *infra*, we decide this issue as a matter of law.

[7] The record in this appeal includes correspondence between a grand jury foreperson and District Judge Owens which reflects a substantial role on the part of the foreperson and in determining the grand jury's schedule.

the United States Attorney's office and the grand jury are through the foreperson. The foreperson decides when to convene and recess the grand jury. The foreperson, acting alone, may excuse grand jurors on a temporary basis. The foreperson may decide the order in which witnesses are called. The foreperson maintains order in the grand jury. The foreperson helps the United States Attorney decide whether to initiate contempt proceedings against recalcitrant witnesses. And according to an offer of proof made by Cross in the trial court, Assistant United States Attorneys were even prepared to testify that on occasion they had sought grand jury subpoena approval from the foreperson acting alone without the consent of the entire grand jury. These duties and responsibilities, and numerous others, considered in isolation, may under certain circumstances seem "ministerial." However, the overall extent and nature of the foreperson's responsibility for the very functioning of the grand jury should not permit the conclusion that the position is constitutionally insignificant.

This reasoning is reinforced by testimony of federal district judges in cases in the Northern District of Florida and the Southern District of Florida as to their selection procedures for grand jury forepersons. *See United States v. Holman*, 510 F. Supp. at 1180; *United States v. Jenison*, 485 F. Supp. at 665-66. Almost uniformly, the district judges selected as forepersons those who had good management skills, strong occupational experience, the ability to preside, good educational background, and personal leadership qualities. One judge even testified that the foreperson should be someone who could not "be easily led by the United States Attorney." *United States* v. *Holman*, 510 F. Supp. at 1180.[8] If the duties of the foreperson were

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[8] For example, Appellant Cross made an offer of proof to the trial court of testimony of United States Attorneys that would show that "[o]n several occasions, the grand jury foreman was

purely ministerial, a person with clerical experience would suffice. The fact that district judges look for far more than that suggests that the position is not insignificant.

Second, even if leadership qualities and administrative ability were not considered in the selection process, the fact of a person's selection as grand jury foreperson may render the position significant. A foreperson has only one vote on the grand jury, but the selection by the district judge might appear to other grand jurors as a sign of judicial favor which could endow the foreperson with enhanced persuasive influence over his or her peers.[9]

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critical of the manner in which the United States Attorney's office conducted investigations before the grand jury, and the United States Attorney's office was responsive to those criticisms."

The nature of the relationship between the grand jury foreperson and the United States attorney could have a significant effect on the deliberations of the grand jury. For example, in the recent case of *Bryant v. Wainwright*, 686 F.2d 1373 (11th Cir.1982) *cert denied*, ____ U.S. ____, 103 S.Ct. 2096, 75 L.Ed.2d ____ (1983), Mattie Lee Bryant was indicted by a Florida state grand jury for first degree murder of her husband. The grand jury foreperson was a white male, and one of the issues presented to this Court was discrimination in the selection of forepersons. According to the state trial court, the shooting of her husband, allegedly an act of self defense against his beatings, was "probably second degree [murder] or manslaughter at most." *See* Appellant's Brief at 31, *Bryant v. Wainwright*, 691 F.2d 512 (11th Cir.1982). In cases such as Mattie Lee Bryant's, which present sensitive sexual or racial issues, the composition of the grand jury and the sex and race of its foreperson conceivably could be of critical importance.

[9] This analysis is limited to Fifth Amendment claims. As several courts have noted, claims of underrepresentation in grand jury foreperson selections presented under the Sixth Amendment raise entirely different considerations. *See, e.g., United States v. Musto*, 540 F.Supp. 346, 361-62 (D.N.J.1982) (federal grand jury foreperson's powers insufficient for purposes of

Third, regardless of the importance of the office of grand jury foreperson, we would not be inclined to refuse to inquire into a federal judge's selection process. To do so would leave us in the indefensible position of scrutinizing, pursuant to *Ross* v. *Mitchell*, state grand jury foreperson selections for discrimination, while we would look the other way when similar challenges are raised against federal selections. We do not presume to guess at this point whether the federal judges of the Middle District of Georgia have in fact discriminated; we cannot, however, refuse to even permit an inquiry into their selection process. As the Court in *Rose* indicated, discrimination in the selection process "is especially pernicious in the administration of justice," 443 U.S. at 555, 99 S.Ct. at 2999, and "strikes at the fundamental values of our judicial system," *id.* at 556, 99 S.Ct. at 3000. For this reason, the Court concluded that, regardless of whether a defendant could prove actual prejudice from such discrimination, "permitting challenges to unconstitutional ... action by [those who make grand jury selections] has been, and is, the main avenue by which [constitutional] rights are vindicated in this context." *Id.* at 558, 99 S.Ct. at 3001.[10] The

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Sixth Amendment claim; merits of Fifth Amendment claim not addressed); *United States v. Breland*, 522 F.Supp. 468, 474-77 (N.D. Ga.1981) (federal grand jury foreperson does not possess sufficient influence over grand jury to permit Sixth Amendment challenge to foreperson selections; Fifth Amendment claim, however, may be presented). In part because of the analytical differences between Sixth Amendment claims and Fifth Amendment claims, we held in *United States v. Perez-Hernandez*, 672 F.2d at 1384-85, that federal grand jury foreperson selections may not be challenged under the Sixth Amendment. Cross raised only a Fifth Amendment challenge in district court and that is all we consider here.

[10] In approving the remedy of motions to dismiss indictments, the court rejected alternative remedies, such as injunctions and other civil actions, as impractical and "expensive to maintain and lengthy." 443 U.S. at 558, 99 S.Ct. at 3001.

same should be true in the federal system. *See United States* v. *Cabrera-Sarmiento*, 533 F.Supp. 799, 802 (S.D.Fla. 1982).

The government seeks to distinguish *Rose* from the instant case on the ground that the Tennessee grand jury foreperson performs significant functions which the federal foreperson does not. In light of our earlier discussion of the federal position, we find few significant differences, and these differences are insufficient for a conclusion that the federal position is constitutionally insignificant. One difference is that the responsibilities of the federal foreperson have been developed by custom, practice, and necessity. Unlike the situation in Tennessee, no federal statute describes the role in detail. In terms of practical effect, however, we fail to see any difference as to whether the position is described by statute or by less formal means. And we do not understand the government to be arguing that, if the foreperson undertakes the duties we described above, he or she is acting *ultra vires*. The Tennessee foreperson also apparently serves more than one grand jury and assists the district attorney in investigating crime. *See Mitchell* v. *Rose*, 570 F.2d 129, 136 (6th Cir. 1978). But for constitutional purposes, the foreperson's role as leader of any given grand jury should far outweigh his role outside the grand jury. Another possible difference, noted above, is that, unlike the situation in Tennessee, the signature of the federal grand jury foreperson is not a prerequisite to a valid indictment. Nevertheless, Federal Rule 6(c) states that the foreperson's signature "shall" be on the indictment; thus, the act of signing is one function that may be only ministerial.[11]

The district court and the government also point out that in Tennessee the foreperson does not actually

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[11] Moreover, the federal grand jury foreperson's signature on an indictment gives the indictment a presumption of validity. *Ward v. United States*, 694 F.2d 654, 658 (11th Cir.1983).

serve as a member of any grand jury, but instead is selected from the public at large and serves several grand juries. In the federal system, on the other hand, the district judge selects a foreperson from the grand jury after it has been empanelled. But this difference is irrelevant insofar as it pertains to the significance of the foreperson's responsibilities in presiding over any given grand jury. Moreover, as long as the pool of potential forepersons contains qualified blacks and women, there should be no difference over the long run in the racial and sexual identity of those selected. In fact, if anything, the office of Tennessee foreperson arguably is less important than that of federal foreperson because the Tennessee foreperson, unlike the federal foreperson, is restricted to performing administrative functions. He does not participate in the grand jury voting process, *see Rose* v. *Mitchell*, 443 U.S. at 560, 99 S.Ct. at 3002, and thus probably does not have the potential for influence on the grand jury's deliberations that the federal foreperson does.

To decide this appeal we need not speculate as to the possible effect of the alleged discrimination on Cross and other defendants in the Middle District of Georgia. It is enough for us that appellant has alleged discrimination in the selection process for a position on the grand jury which has significant responsibilities. Otherwise, if we were to decide that the foreperson position is insignificant, it would in our view be but a small step toward deciding in the next case that other compositional defects in the grand jury also are irrelevant. If the grand jury is to effectively fulfill its role as a check on prosecutorial abuse, the judicial system must jealously guard against attempts at undermining the grand jury's constitutional significance. For this reason, we disagree with the conclusion of the district court.

IV.

The basis for Cross's recusal motion was that, having made the foreperson selections, the district judges of the Middle District of Georgia would be called as witnesses in a hearing on the merits of the foreperson discrimination claim. The district court, reasoning that the claim was to be dismissed and that "judges are under no obligation to divulge the reasons that motivated them in their official acts," concluded that a district judge's "subjective decision made in the exercise of the judge's judicial authority" should not be "subject to assault on the witness stand." 516 F.Supp. at 707-08.

Challenges to federal grand jury foreperson selections have been brought in other federal district courts in this Circuit. In each of these cases, the courts apparently have had little difficulty in calling federal district judges to the witness stand. For example, in *United States* v. *Jenison*, 485 F. Supp. at 665, eight United States District Judges from the Southern District of Florida testified as to the criteria they utilized in making grand jury foreperson selections, and as to whether they discriminated on the basis of race or sex. And in *United States* v. *Holman*, 510 F.Supp. at 1180, a federal district judge testified concerning the selection procedures in the Northern District of Florida. *See also United States* v. *Cabrera-Sarmiento*, 533 F.Supp. at 805 n. 2; *United States* v. *Breland*, 522 F.Supp. 468, 471-74 (N.D.Ga.1981) (testimony of nine federal district judges). Further, the practice of calling federal judges to testify in these cases has been discussed, and approved *sub silentio*, on two occasions in the Eleventh Ciruit. *See United States* v. *Holman*, 680 F.2d at 1357; *United States* v. *Perez-Hernandez*, 672 F.2d at 1387-88 (defendant adopted record in the *Jenison* case for purposes of his dismissal motion).

Even with this precedent, we recognize that "[i]t is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision." *Washington* v. *Strickland*, 693 F.2d 1243, 1263 (5th Cir. Unit B 1982) (en banc) (testimony of state trial judge concerning his reasons for imposing death penalty inadmissible), *cert. granted* on other grounds, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d ___. But the matter before us is clearly collateral to any judicial decision that forms part of a traditional judicial proceeding. As the person who selects the foreperson, a federal judge performs the same task that some states have delegated to jury commissioners. Moreover, the importance of the interests at stake and the absence of any alternative source of evidence concerning Cross's claim may suggest special reasons for hearing the testimony of a federal district judge. And hearing such testimony should not undermine the policies articulated by the court in *Washington* which favored exclusion in that case—namely, the risk of inaccurate testimony, the importance of finality and integrity of judgments, and considerations of federalism in habeas corpus proceedings. *See* 693 F.2d at 1263.

[5] The question of recusal, however, should be decided as an initial matter by the district judge. For this reason, we remand this issue to the district court for reconsideration in light of our holding permitting Cross to present his claim, and in light of the fact that the testimony of a federal district judge in this matter probably would not conflict with the general rule against probing a judge's mental processes.

V.

For the above reasons, we REVERSE the judgment of the district court which denied apellant's foreperson discrimination claim and his recusal motion and REMAND for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Cr. No. 80-1016-COL

FILED: JUNE 18, 1981

UNITED STATES OF AMERICA

v.

WILLIAM HOWARD CROSS, SR., ET AL.

OPINION AND ORDER

William Howard Cross, Sr., one of the defendants named in the indictment above referred to, moves the court to dismiss the indictment against him on the grounds that (1) the procedures by which grand jurors and petit jurors have been selected in this District since 1973 do not assure grand and petit jury panels selected at random from a fair cross-section of the community as required by the Sixth Amendment of the Constitution and the Jury Selection and Service Act of 1968, as amended, 28 U.S.C.A. § 1861, et seq.; and (2) that black citizens and women have been discriminated against the selection of grand jury foremen in violation of the Fifth Amendment. Defendant Cross further moves for the recusal of this United States District Judge, the Chief Judge of this District, Wilbur D. Owens, Jr., and recently retired Senior Judge William A. Bootle on the ground that all three of these judges have appointed one or more grand jury foremen during the period in question and therefore will, by necessity, be called as witnesses in any hearing regarding defendant's claim of discrimination in the appointment of grand jury foremen. This opinion constitutes the court's

ruling on the motion to dismiss based on the claim of discrimination in appointment of grand jury foremen and on the motion to recuse.[1]

THE MOTION TO DISMISS INDICTMENT

An initial and controlling question with regard to defendant's claim that blacks and women have been discriminated against in the selection of grand jury foremen is whether the position of a federal grand jury foreman possesses any constitutional significance so that the appointment by a federal district judge of only white males to the position of grand jury foreman can be challenged by this defendant on constitutional grounds, and the court has carefully considered the case law on the issue of disqualification of judges and has not found any basis on which this judge would be disqualified from ruling of this initial question[2] of whether the position of foreman is of constitutional significance. Furthermore, it is the court's duty to rule in the first instance of the sufficiency of the grounds asserted in defendant's motion for recusal. *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, at 1021 (5 Cir. 1981).

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[1] The defendant's claim with regard to composition of grand and petit jury panels will be dealt with in a separate opinion.

[2] Under either of the disqualification statutes, 28 U.S.C.A. §§ 144 and 455, any possible prejudice or bias on the part of the judge sufficient to require his disqualification must be personal and must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case or related or similar cases. *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, at 1020 (5 Cir. 1981). Any action taken by this judge with regard to the impanelling of grand juries or appointments of foremen or deputy foremen would have necessarily been actions within his judicial duties. The records show that this judge has impanelled only one of the fifteen grand juries which have been impanelled in this district since 1973 and has appointed only one foreman and one deputy foreman.

After careful analysis it is the court's opinion that the position of grand jury foreman or deputy foreman[3] does not possess constitutional significance and therefore the failure to appoint any blacks or women to that position cannot be challenged on constitutional grounds. The grand jury foreman exercises only minor administrative duties in the conduct of grand jury proceedings. Rule 6(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman."

It is unreasonable to assume that a grand jury foreman having only the administrative duties above described has some special influence over from 15 to 22 other individual grand jurors. The position is certainly not comparable to that of the chairman of a committee or a chairman of a board of directors who might guide a decision-making process.[4]

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[3] Although defendant does not appear to attack the appointments to the position of deputy foreman during the period in question (possibly because blacks and women have been appointed deputy foremen), this position is relevant to the court's present discussion, particularly since the deputy foreman assumes the responsibilities of the foreman in his absence, thus the court's ruling on the constitutional significance of the position of grand jury foreman applies equally to that of deputy foreman.

[4] It is important to remember that while there is a right to a constitutionally and statutorily composed grand jury box, there is no constitutional right to a grand jury panel of a particular

It is, of course, well established that the Sixth Amendment right to trial by an impartial jury includes the right to be indicted by a grand jury composed of members drawn from a source representing a fair cross-section of the community, *Duren* v. *Missouri*, 439 U.S. 357, 58 L.Ed.2d 579 (1979); *Castaneda* v. *Partida*, 430 U.S. 482, 51 L.Ed.2d 498 (1977); and the Jury Selection and Service Act of 1968, 29 U.S.C.A. §§ 1861-1870, was enacted by Congress to effectuate this constitutional right. In order to achieve the cross-sectional objective the Act provides comprehensive and detailed judicial machinery for the selection of federal grand jurors designed to insure that the jury venire will be drawn from a cross-section of the community. In sharp contrast with this detailed legislative scheme for the selection of a grand jury chosen from a fair cross-section of the community as required by the Sixth Amendment, there is only one provision in the United States Code applicable to the appointment of grand jury foremen and deputy foremen, to-wit:

> "The court shall appoint one of the jurors to be foreman and another to be deputy foreman."

Rule 6(c), Federal Rules of Criminal Procedure. No standards are provided to govern the district judge's selection of the foreman and deputy foreman. The Congress has simply left the appointment of these positions to the sole discretion of the district judge.[5] It is reasonable to assume that had Congress perceived the appointment of the grand jury foreman to be of constitu-

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composition. *Taylor* v. *Louisiana*, 419 U.S. 522, 42 L.Ed.2d 690 (1975).

[5] It may be logically presumed that the district judge in his discretion will appoint as foreman the grand juror who because of his age, experience, education, employment, etc., appears to be the best qualified to carry out the duties of foreman whether that person be white, black, male or female. See *United States* v. *Jenison*, 485 F. Supp. 655, at 666 (S.D. Fla. 1979).

tional significance it would have provided in Rule 6 some standards or procedures to govern the district judge's appointments to these positions.

The precise question of whether the position of grand jury foreman has constitutional significance has not been decided by any appellate court. The only case directly holding that constitutional significance attaches to the position of federal grand jury foreman is a district court opinion, *United States* v. *Jenison*, 485 F. Supp. 655, 661 (S.D. Fla. 1979) (Circuit Judge Hatchett, sitting by designation). That holding was premised on the view that in the case of *Rose* v. *Mitchell*, 443 U.S. 545, 61 L.Ed.2d 739 (1979), the Supreme Court, although reversing the Sixth Circuit Court of Appeals, "had no disagreement with the Sixth Circuit's conclusion that 'proof of discrimination in the selection of a grand jury foreman mandates the same remedy as does proof of discrimination in the selection of the grand jury.'" *Jenison*, at 661.[6]

It is my opinion that the *Jenison* court's reliance on *Rose* v. *Mitchell* in holding that constitutional significance attaches to the position of federal grand jury foreman is misplaced for several significant reasons. First of all, as Judge Keady recognized in *United States* v. *Alexander, et al.*, Cr. No. 79-09 N. (N.D. Ga. March 19, 1981) (at footnote 25), since the Sixth Circuit Court's decision in *Rose* finding a constitutional violation was reversed on appeal that decision has little, if any, precedential value, especially in a case involving the position of *federal* grand jury foreman. Second, the Supreme Court in *Rose* v. *Mitchell*, in dictum, merely *assumed* for purposes of that case that the position of a state grand jury foreman under the Tennessee grand

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[6] A good brief discussion of the *Jenison* decision appears in *United States* v. *Alexander, et al.*, Cr. No. 79-09 N (N.D. Ga. March 19, 1981) (J. Keady, sitting by designation), at footnote 25.

jury system at issue in that case had some constitutional significance. The Court stated:

> "In view of the disposition of this case on the merits, we may assume without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire. See Carter v Jury Comm'n, 396 US 320, 338, 34 LEd 2d 546, 90 S Ct 518 (1970)."
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> *Rose* v. *Mitchell*, 443 U.S. at 552, note 4, 61 L.Ed. 2d, at 747, note 4.[7]

The court found it unnecessary to address the issue in light of the defendant's failure to establish a prima facie case of discrimination. Thus, while, as the *Jenison* court emphasized, the Supreme Court in *Rose* did not express disagreement with the Sixth Circuit's conclusion that "proof of discrimination in the selection of a grand jury foreman mandates the same remedy as does proof of discrimination in the selection of the grand jury", it also did not agree with or otherwise comment upon that conclusion. The Supreme Court clearly left the issue open with respect to the position of grand jury foreman under the Tennessee grand jury system and

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[7] The court is aware of two cases in which the Court of Appeals for the Fifth Circuit, citing *Rose* v. *Mitchell*, has also *assumed* that "the right to a grand jury selected without regard to race applies fully when only the selection of the foreman is at issue rather than the selection of the grand jury venire". *Williams v. State of Mississippi*, 608 F.2d 1021, at 1022 (5 Cir. 1980); *Guice* v. *Fortenberry*, 633 F.2d 699, at 703, note 6 (5 Cir. 1980). Like *Rose* v. *Mitchell*, both of these cases involved a challenge to the appointment of a state grand jury foreman, neither case explained the basis for the assumption, and the assumption was not significant in view of the disposition of the case on the merits. Thus the discussion of the assumption in *Rose* v. *Mitchell*, infra, is applicable to these Fifth Circuit cases.

especially with respect to the position of federal grand jury foreman.

The third reason why this court believes the *Jenison* court's reliance on *Rose* v. *Mitchell* to be misplaced is that the subject of the Supreme Court's inquiry there was the position of a grand jury foreman under Tennessee's grand jury system. That position was different in significant respects from that of a federal grand jury foreman under Rule 6(c) of the Federal Rules of Criminal Procedure. The Tennessee grand jury system at issue in *Rose* permitted the foreman to be "hand picked" by the Superior Court Judge *from the public at large* and not from the veniremen chosen at random as were the other members of the grand jury. There obviously is an important difference between a state judge selecting the grand jury foreman of his choice from the public at large and a federal district court judge selecting a foreman from among a constitutionally and statutorily composed grand jury of 23 members.

There are other significant differences. The Tennessee grand jury foremen were appointed for a term of two years and were often reappointed for additional terms. Of the three grand jury foremen who testified in the district court hearing one had served as foreman for five or six years (three consecutive grand juries) and two or three additional sessions. The second foreman had served for several years and on several occasions during illness of the regular foreman. The current foreman had so far served for one session. Thus, the position of foreman of the state court grand jury which was at issue in *Rose* was a regular and in some cases a long term position. In contrast, although a federal grand jury may serve for as long as 18 months (Rule 6(g)), in this district several grand juries remain impanelled during the same period so that as a practical matter a particular grand jury in this district will nor-

mally convene only every other month for a period of one or two days.

The Court of Appeals for the Sixth Circuit in its opinion in *Mitchell* v. *Rose*, 570 F.2d 129 (6 Cir. 1978), described the duties of the grand jury foreman under the Tennessee law:

> "He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments, and like every other chairperson is in a position to guide, whether properly or improperly, the decision-making process of the body. Additionally, the indorsement and signature of the foreman or forewoman is indispensible to an indictment in Tennessee, and their absence voids the bill. *Bird* v. *State*, 103 Tenn. 343, 52 S.W. 1076 (1876)."
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> *Id.*, at 136.[8]

Thus, the position of the Tennessee grand jury foreman discussed in *Rose* v. *Mitchell* was different from the position of federal grand jury foreman in the method of appointment, in overall duties, and, in this court's opinion, in the potential for being a special position of influence over the decision-making process of the grand jury. The court finds, contrary to the conclusion of the court in *Jenison*, that *Rose* v. *Mitchell* is distinguishable in this respect. See *Jenison*, supra, at 661.

For the reasons above outlined, the court concludes that the decision in the Supreme Court in *Rose* v. *Mitchell* is not persuasive in this case involving the appointment of federal grand jury foremen. Therefore, with due respect to the opinion of Judge Hatchett in *Jenison*, this court declines to follow that decision.

In summary, it is the opinion of this court that no constitutional significance attaches to the position of

[8] In this district the questioning of the witnesses before the grand jury is normally done by the United States Attorney.

foreman or deputy foreman of federal grand jury. A criminal defendant has no constitutional right to a grand jury foreman or deputy foreman of a particular race or sex any more than he has a contstiutional right to a grand jury panel of a particular composition or a constitutional right to a Supreme Court Justice, a United States Circuit Judge, or United States District Judge of a particular race or sex. Accordingly, the court holds that the appointment by a district judge under Rule 6(c), Federal Rules of Criminal Procedure, of a foreman or deputy foreman in a federal grand jury drawn from a source constitutionally and statutorily composed, and thus representing a fair cross-section of the community, is not subject to constitutional attack on grounds of discrimination. See *Hale* v. *Henderson*, 485 F.2d 266, 269-270 (6 Cir. 1973).

Even assuming that the position of federal grand jury foreman is of constitutional significance so that a defendant can assert a constitutional challenge to a district court's appointment of grand jury foremen, and applying the decision of Judge Hatchett in *Jenison*, the court finds that the defendant's constitutional claim with respect to the appointment of grand jury foremen must in any event be dismissed. In *Jenison* Judge Hatchett found that the appointment of federal grand jury foremen can be subjected to constitutional scrutiny on the basis of either the Sixth Amendment fair cross-section requirement or the equal protection prohibition against purposeful discrimination. The court held with regard to the fair cross-section requirement that:

> "Absent a showing that the impact of the grand jury foreperson is so substantial as to influence or alter the unique qualities and characters of the jury's individual members, a defendant's right to a fair cross-section is not denied where identifiable groups are underrepresented in the position of grand jury foreperson."
> *Jenison*, at 661, 662.

The defendant here does not challenge the appointment of grand jury foremen based on the fair cross-section requirement (defendant's motion to dismiss indictment, ground 6), nor could he effectively do so since the court has held that a federal grand jury foreman does not, simply because of his position, have any special influence on the decision-making process of the grand jury.

The court in *Jenison* further held that a defendant can challenge the appointment of federal grand jury foremen on the ground that cognizable classes were purposefully excluded from the office of grand jury foreperson in violation of the Fifth Amendment equal protection right. *Jenison*, at 662.[9] However, in *Castaneda* v. *Partida*, supra, 430 U.S. at 494, 51 L.Ed.2d at 510, the Supreme Court held that "in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation *of his race or of the identifiable group to which he belongs*". (Emphasis added.) See also *Guice* v. *Fortenberry*, 633 F.2d 699, 703 (5 Cir. 1980). This test applies equally to a defendant alleging the purposeful exclusion of a particular class from the office of federal grand jury foreman.[10]

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[9] Purposeful discrimination against a class of persons in violation of the equal protection clause of the Fourteenth Amendment also constitutes a violation of the due process clause of the Fifth Amendment. *United States* v. *Gordon-Nikkar*, 518 F.2d 972 (5 Cir. 1975). See *Jenison*, supra, at 660.

[10] In *Castaneda* v. *Partida* a Mexican-American alleged discriminatory exclusion of Mexicans from the Texas grand jury selection process. It appears that the court in *Jenison* did not disclose the race or sex of the defendants raising the equal protection challenge in that case. The court also did not mention the requirement of *Casteneda* v. *Partida* that the defendant must be a member of the class which he claims has been purposefully excluded from the process.

Since defendant Cross is a white male he has no standing under an equal protection analysis to challenge the exclusion of blacks and females from the office of Federal grand jury foreman in this district. The other defendants, who are also white males, likewise would have no standing to maintain such a challenge in this case.

For all of the reasons above stated, the defendant's motion to dismiss the indictment for reason that blacks and women have been discriminated against in the selection of grand jury foremen must be and is hereby denied.

THE MOTION TO RECUSE

Although the foregoing discussion adequately deals with the issue before the Court, I feel compelled to address a tangential issue raised by the defendant in his Motion to Recuse. Paragraph 4 of the motion states that the three judges of this district "will, by necessity, be witnesses at any hearing on this matter". To enable the court to intelligently pass upon the recusal motion a preliminary hearing was conducted by the court in the course of which the court inquired of counsel for the defendant (Mr. Swearingen) what testimony he expected to elicit from the judges of this court if the judges appeared as witnesses, and defense counsel replied as indicated by the following colloquy between court and counsel:

> THE COURT: Now you have filed a motion here to disqualify me as a judge in the case. I'm calling on you to specify what it is you intend to ask me as a witness, if I appear as a witness in the case, so I will know whether or not I should disqualify in the case. You just filed a blanket motion to disqualify every judge in this district. As an officer of the Court I'm calling on you to specify what it is you intend to ask us as witnesses, if we are witnesses in the case.

MR. SWEARINGEN: We intend to ask if you discriminated—how you considered a poor person, did you look at race, did you look at the sex, did you look at position in the community? Did you look at wealth? Did you look at your friends?

THE COURT: In other words, you intend to ask us how we arrived at the decision to appoint the person that we appointed?

MR. SWEARINGEN: Yes, sir.

THE COURT: Is that what you intend to ask?

MR SWEARINGEN: Yes, and how you arrived at excusing people from Grand Jury service.

THE COURT: All right, in other words, that's the type questions you intend to ask?

MR. SWEARINGEN: Yes, sir.

THE COURT: In other words, our reasons for doing what we did or did not do?

MR. SWEARINGEN: Yes, sir.

THE COURT: That's what I wanted to know.

It is my opinion that the judges of this court could not be compelled to testify concerning the matter sought to be elicited by the defendant by such questioning.

Canon Two of the Code of Judicial Conduct requires that a judge avoid impropriety and the appearance of impropriety in all his activities. Among other things it states that he should not testify voluntarily as a character witness. The relevance of this language to the present issue is found in the commentary and an Advisory Opinion to the Canon. The commentary states that Canon Two should not be interpreted as affording judges a privilege against testifying in response to an official summons. Advisory Opinion No. 9 expresses the opinion of the Advisory Committee that, if subpoenaed, a judge must respond to the subpoena and that the trial judge should make it clear that the judge witness was testifying in response to a subpoena. What Canon Two and its explanatory notes do *not* provide, however, is a

standard for determining when a judge may be *compelled* to testify. To determine this it is necessary to look to the case law.

As to a cause not on trial before him, there is general agreement that a judge is *competent* to testify. There is not as much agreement as to whether a judge is immune from service of process or may be compelled to testify in a cause not on trial before him. Even assuming judges are not immune from service of process, the cases seem to be in agreement that judges are under no obligation to divulge the reasons that motivated them in their official acts; the mental processes employed in formulating the decision may not be probed. *Annot., Judge As Witness In Cause Not On Trial Before Him*, 86 ALR 3d 633 (1973).

In *United States* v. *Morgan*, 313 U.S. 409, 85 L.Ed. 1429 (1940), the Supreme Court held that it was error for a district court to compel the Secretary of Agriculture to testify as to the manner in which he reached his decision. The court compared the proceeding before the Secretary to one before a judge and stated that an examination into the mental processes of a judge would be destructive of judicial responsibility and thus should not be permitted, the court stating in the body of its opinion:

> "Just as a judge cannot be subjected to such a scrutiny, ... so the integrity of the administrative process must be equally respected."
>
> *Id.*, at 422.

In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 28 L.Ed.2d 136 (1971), the court determined that examination of an administrative decision-maker would be permitted only with a strong showing of bad faith or improper behavior and subsequent cases have adopted this principle and have upheld the refusal to enforce subpoenas for oral testimony of decision-makers as to the basis for their opinions "absent extreme and

extraordinary circumstances",[11] and such circumstances could only be shown after overcoming the presumption of regularity as to the acts of the decision-maker. *Beverly* v. *U.S.*, 468 F.2d 732, 743 (5 Cir. 1972).

In *United States* v. *Dowdy*, 440 F. Supp. 894 (W.D. Va. 1977), the defendant was indicted for testifying falsely before a grand jury. Prior to her appearance before the grand jury she had been adjudged in contempt by District Judge Glen Williams for improperly invoking her Fifth Amendment privilege and for her attitude and demeanor. The defendant claimed that the actions of Judge Williams in this matter coerced her into testifying before the grand jury, thus providing her with a defense to the charge of making false statements before the grand jury, and she contended that Judge Williams' testimony was necessary in regard to this defense. The Government made a motion to quash the subpoena which had been served upon Judge Williams, and District Judge Dalton, who presided in the criminal trial, sustained the motion, stating:

> "While a judge enjoys no special privilege from being subpoenaed as a witness, it is imperative when he is called to testify as to action taken in his judicial capacity, to carefully scrutinize the grounds set forth for requiring his testimony. Should a judge be vulnerable to subpoena as to the basis of every action taken by him, the judiciary would be open to 'frivolous attacks upon its dignity and integrity, and ... interruption of its ordinary and proper functioning.' U.S. v. Valenti, 120 F.Supp. 80 (D.N.J.1954)."
>
> *Id.*, 896.

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[11] See *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (1 Cir. 1974); *KFC National Management Corp.* v. *NLRB*, 497 F.2d 298 (2 Cir. 1974); *Montrose Chemical Corp.* v. *Train*, 491 F.2d 63 (D.C. Cir. 1974).

The test which should be applied in determining whether a judge may be compelled to testify is well stated by Judge Austin, of the United States District Court for the Northern District of Illinois, in *Standard Packaging Corporation* v. *Curwood, Inc.*, 365 F. Supp. 134 (1973), as follows:

> "Generally, all individuals are subject to the lawful authority of a competent court to compel testimony of any facts within their knowledge and relevant to the issues at hand. (Citations omitted.) An exemption from compulsory testimony is recognized in certain situations to protect the integrity and individual responsibility of government officials whose duties involve the exercise of judicial and quasi-judicial authority (Citations omitted.)
>
> . . . . .
>
> "The essential line of demarcation appearing from the cases is that judicial and quasijudicial officers may be compelled to testify only as to relevant matters of fact that do not probe into or compromise the mental processes employed in formulating the judgment in question. . . . Thus, even though a particular inquiry may be factually directed, it may still be objectionable if it invades upon the official's good faith decision-making prerogatives."

The appointment of a grand jury foreman and deputy foreman by the district court judge is clearly a subjective decision made in the exercise of the judge's judicial authority and is not subject to assault on the witness stand. To require a judge to explain *why* he made the choice he did would be an intolerable invasion into the mental processes employed by him in making that decision. Since that is exactly what counsel for the defendant in this case has stated he would seek to do with regard to the three judges of this court it is clear that the judges would be under no compulsion to testify, and

since they would not be witnesses in the case there would be no reason for their recusal.

In any event, the defendant's claim that blacks and women have been discriminated against in the selection of grand jury foremen having been dismissed, there is no reasonable likelihood that any of the three judges of this district will be witnesses at any future hearing in this matter.

Accordingly, the defendant's motion to recuse is hereby denied.

IT IS SO ORDERED this 18th day of June, 1981.

/s/ J. Robert Elliott
J. ROBERT ELIOTT
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7783

D.C. Docket No. CR80-01016

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

WILLIAM HOWARD CROSS, SR.,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Middle District of Georgia

Before JOHNSON and ANDERSON, Circuit Judges, and COLEMAN*, Senior Circuit Judge.

JUDGMENT

The cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court.

JUNE 30, 1983

ISSUED AS MANDATE: OCTOBER 5, 1983

*Honorable James P. Coleman, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SEPTEMBER 26, 1983

No. 81-7783

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

WILLIAM HOWARD CROSS, SR.,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 30, 11 Cir., 1983, ____ F.2d ____).
(September 26, 1983)

Before JOHNSON and ANDERSON, Circuit Judges, and COLEMAN*, Senior Circuit Judge.

PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

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*Honorable James P. Coleman, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank Johnson, Jr.
FRANK JOHNSON, JR.
United States Circuit Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1037

UNITED STATES OF AMERICA,

Petitioner,

versus

WILLIAM HOWARD CROSS, SR.,

Respondent,

INFORMAL BRIEF IN RESPONSE TO THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. CROSS, SR.,
Pro se

1341 Woodhill Drive
Marietta, Georgia 30066
(404) 977-2554

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1037

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HOWARD CROSS, SR.

INFORMAL BRIEF IN RESPONSE TO THE GOVERNMENT PETITION FOR A WRIT OF CERTIORARI

The Defendant, proceeding pro se, responds to the United States Petition for a Writ of Certiorari and shows good cause why the Petition should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 708 F. 2d 631 and the opinion of the district court is at 516 F. Supp. 700.

JURISDICTION

The opinion of the court of appeals was entered on June 30, 1983. The government's

petition for rehearing was denied on September 26, 1983. The government did not file to stay the Mandate in this case. On November 16, 1983, Justice Powell granted the government's request for an extension of time in which to file a petition for a Writ of Certiorari until December 25, 1983. The government filed a petition for a Writ of Certiorari on December 23, 1983. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

The Defendant respectfully submits that his Response to the government's petition for a Writ of Certiorari is timely filed.

STATEMENT

The government seeks to have this case disposed of in light of the court's decision in Hobby v. United States, No. 82-2140.

Respondant would respectfully show that this case is unlike that of Hobby for several reasons.

For years racial discrimination has been commonplace in south Georgia. This is an established way of life which only time can change. In the instant case, the discrimination the Respondant stands aggrieved of if the result of the unique circumstances that exist in the Middle District of Georgia. These circumstances do not necessarily exist in the Hobby case, or in any other circuit.

In the Middle District of Georgia, the elite white males have effectively controlled the administration of justice by selecting grand jury forepersons that were white males and who possessed basically the same morals and ideologies as they did, thereby making the grand jury foreperson a conduit in which they could effectively control who was and who was not indicted.

While Federal statutes suggest that the position of Grand Jury Foreman is constitu-

tionally insignificant, this is not the practice in the Middle District of Georgia.

In reality, and in application of those statutes which govern the duties of the grand jury foreperson, there exists in the Middle District of Georgia a situation which, however unique, does cause the position of grand jury foreperson to become constitutionally significant, even though this may not be in accord with what was intended by those statutes.

This situation magnifies the need for there to be a fair cross-section of the community represented when choosing the position of grand jury foreperson.

This situation was recognized by Judge Johnson when he states, we know what you want to do, to indict anybody you want to, whenever you want to, without anyone else having input, the control comes from the grand jury foreman.

The power endowed upon the grand jury foreperson, by the United States Attorney, and the other unique circumstances that exist in the Middle District of Georgia, decree his constitutional significance.

This is a situation that is the result of historical events that are unique only to this region and cannot be ignored.

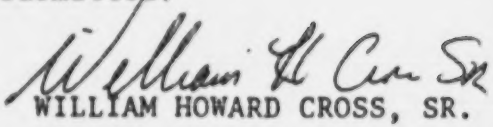
Therefore, the Respondant would respectfully urge that however similar the Hobby case may appear, in reality this case possesses a different set of circumstances, and retains a different spirit than that of Hobby.

CONCLUSION

In concluding, the Respondant would urge the Court not to grant the government's petition for a Writ of Certiorari, but to allow this case to be disposed of in accord with the opinion of the Eleventh

Circuit Court of Appeals.

Respectfully submitted.



WILLIAM HOWARD CROSS, SR.
pro se

JANUARY 1984.

Certificate of Service

This is to certify that I have this day served A copy of the within and foregoing document By depositing the same in the United States Mail with Adequate postage thereon to:

Rex E. Lee
Solicitor General
U.S. Department of Justice

This the 23rd day of January 1984.

William H. Cox Sr